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Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1132

WILLIAM D. ARNOLD, FLOYD W. MCKINSEY, ABRAHAM BARON, WARREN H. CHURCHILL, ROBERT W. ASH, HORACE W. HOWLAND, CHARLES MCGUIRE, ROBERT COHEN, PAUL LEE BLUFF, STEVEN Z. KRSTICH, MICHAEL MALETA, ANGELO J. MASI, RUDOLPH C. DE LUNA, W. H. HOPKINS, PATRICK J. GERMON, JAMES C. DENNIS, JAMES NELSON HOPKINS,
Petitioners,

VS.

BERT R. TIFFANY, STEPHEN RATKOVICH, LLOYD SPENCE, HARRY L. CLARKE, JOE CAPPONI, ROBERT D. NELSON, VANCE L. STICKELL, THE TIMES MIRROR COMPANY, WES SPAULDING, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals for the Ninth Circuit

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of

Appeals for the Ninth Circuit entered in this cause on October 25, 1973.

OPINIONS BELOW

The memorandum and order of the United States District Court granting respondents' motion to dismiss the complaint under F.R.Civ.P. 12(b)(6) and denying petitioners' motion for a preliminary injunction is unreported and is printed in *Appendix A* herein. The opinion of the United States Court of Appeals affirming the judgment of the District Court is reported at ..... F.2d ..... and is printed in *Appendix B* herein.

JURISDICTION

The judgment of the United States Court of Appeals was entered on October 25, 1973. The jurisdiction of this Court is invoked under 62 Stat. 928 (1948), 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Do the actions of The Times Mirror Company, publisher of the Los Angeles Times newspaper, in concert with others, occurring over a period of decades up to the present time and based upon a virulent hatred of any association of Los Angeles Times independent newspaper dealers, state a cause of action under Title 42, Section 1985(3) when that hatred re-

sults in threats, reprisals, spying and bribes designed to prevent a class of over 400 individuals who purchase, distribute and sell the Los Angeles Times newspaper from meeting together, exchanging ideas, listening to speakers and forming, joining, participating and maintaining an association of their choice?

STATUTES INVOLVED

The federal statute which this case involves is Section 1985(3) of Title 42 of the United States Code which provides as follows:

> "If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons

engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

STATEMENT OF THE CASE

1. The Nature of the Case

This is a civil rights action brought in the United States District Court for the Central District of California on February 12, 1973, under Sections 1981, 1982 and 1985(3) of Title 42 for both damages and injunctive relief by seventeen independent Los Angeles Times newspaper dealers, petitioners herein, against The Times Mirror Company, publisher of the Los Angeles Times newspaper, seven of its officers and employees, and an independent Los Angeles Times newspaper dealer who acted as an agent provocateur, respondents herein, alleging a conspiracy beginning some time prior to 1964 and continuing up to the date of filing of the complaint whereby respondents "have conspired with invidiously discriminatory animus to deprive on a class-wide basis Los Angeles Times newspaper dealers including [petitioners] of the equal protection of the laws through intimidating, harassing, causing economic injury and coercing said dealers from exercising their rights

under the First and Fourteenth Amendments to the United States Constitution to peaceably assemble." (CT 7-8). The basis for federal jurisdiction in the District Court is Sections 1331 and 1343 of Title 28 of the United States Code.

2. The Proceedings to Date

At the time that petitioners filed their complaint in the District Court they also filed a motion for a preliminary injunction seeking to enjoin the respondents from carrying on their campaign of threats, reprisals, spying, bribery and injury against independent Los Angeles Times dealers who attended, participated or joined an association known as the California Association of Independent News Distributors. (CT 130-31). This campaign has intensified since February 12, 1973 when the complaint was filed.[1]

The motion for preliminary injunction was supported by six very detailed affidavits setting forth this history of intimidation, harassment and coercion by the respondents. Two of the affidavits were by persons who had been employees of the Los Angeles Times circulation department and had been privy to the events from the inside.[2]

---

[1]In the event the Court grants the writ herein requested a motion will be brought in this Court to temporarily enjoin this conduct until the matter is decided.

[2]The Clerk of the United States Court of Appeals has been requested by petitioners' counsel to certify the record and have it transmitted to this Court. The affidavits of Abraham Baron (CT 67-71), Brian E. Bumpas (CT 72-85), Robert Cohen (CT 86-90), Robert Ash (CT 91-97), Warren H. Churchill (CT 100-114) and William D. Arnold (CT 115-129) set forth the particulars.

The motion for preliminary injunction was heard by the District Court on February 26, 1973[3] and continued to February 27, 1973 for an informal conference with the Court to discuss the holding of an evidentiary hearing requested by petitioners. At this conference counsel for respondents stated that to test the legal sufficiency of the complaint they intended to file a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. That motion was filed, briefed and heard by the District Court on March 2, 1973 pursuant to agreement between the Court and counsel for the parties. On March 5, 1973, the District Court handed down its "Memorandum and Order Granting Motion to Dismiss". This order denied petitioners' motion for a preliminary injunction and dismissed the complaint. See *Appendix A*.

Following the Court's order of March 5, 1973, petitioners moved the District Court for an injunction pending appeal pursuant to Rule 62(c) of the Federal Rules of Civil Procedure. The Court heard and denied the motion on March 5, 1973. (Reporter's Transcript of Proceedings on March 5, 1973. (Vol. 4)). Thereafter, petitioners filed a Notice of Appeal from the order denying the preliminary injunction and dismissing the complaint. (CT 348).

---

[3]At the February 26, 1973 hearing on the preliminary injunction petitioners had under subpoena certain witnesses from whom affidavits could not be obtained. Petitioners' counsel made an offer of proof to the Court on the testimony to be elicited from these witnesses. (Vol. 2, RT 13-14, 21).

On March 7, 1973 petitioners filed in the United States Court of Appeals a motion for injunction pending appeal pursuant to Rule 8(a) of the Federal Rules of Appellate Procedure. By its Order dated March 14, 1973, the Court of Appeals denied this motion. On May 4, 1973 petitioners filed a motion to expedite the hearing of oral argument on the appeal because of the continuing acts of intimidation and harassment engaged in by the respondents against Los Angeles Times independent newspaper dealers. That motion was granted and the oral argument was heard on August 7, 1973. On October 25, 1973 the Court of Appeals affirmed the judgment of the District Court. See *Appendix B.* The Court of Appeals has stayed the mandate:

3. The Material Facts

The complaint, the affidavits and the offer of proof catalog the following facts in support of the action.

(a) The Parties

Petitioners, except for Arnold, are presently independent contractors engaged in the purchase, distribution and sale of the Los Angeles Times. They are known as newspaper dealers. Certain petitioners, called "street dealers", sell the Times to retail outlets, purchasers from vending machines and newsboys or hustlers in designated territories. Other petitioners, called "home delivery dealers", sell the Los Angeles Times to home delivery subscribers in designated territories. Petitioners operate under written contracts prepared by The Times Mirror Company. (CT 14-

26). Petitioner Arnold was a Los Angeles Times street dealer from December 20, 1965 until March 5, 1973. His termination as a dealer by respondents precipitated this action.

Respondent The Times Mirror Company, with revenues of $611 million from all sources in 1972, is the biggest of the 20 "public" companies that publish newspapers. It is the parent of the Los Angeles Times, Dallas Times-Herald, Newsday (Long Island, N.Y.) and Orange Coast Pilot. The Los Angeles Times weekday circulation, which averaged 1,012,594 copies during 1972, is the third largest weekday circulation among the nation's newspapers and leads all other newspapers in the country in volume of home-delivered weekday circulation. Except for respondent Wes Spaulding all of the individual respondents are officers or employees of The Times Mirror Company. Respondent Wes Spaulding is an independent Los Angeles Times street dealer.

(b) Pre 1964 Actions

Around 1945 and 1946, at Christmas time, the Los Angeles Times street dealers were invited to the executive dining room of The Times Mirror Company. There, management would arrange for the street dealers to listen to a tape recording of the voice of Norman Chandler, then publisher of the Los Angeles Times. Although this was intended to be a Christmas message, Mr. Chandler's remarks were invariably directed to the theme that The Times Mirror Company was unalterably opposed to any kind of organization

of individuals who were associated with The Times Mirror Company. (CT 91-92).

In 1949, as a result of several wholesale rate increases, petitioner Cohen solicited the opinions of other Los Angeles Times dealers regarding their economic plight. The then circulation manager of the Times, Ray Marx, called Mr. Cohen into his office and made very clear to him that The Times Mirror Company was adamantly opposed to any organization of its dealers and that anyone found to be engaging in dealer organization activities would be terminated. For approximately six months thereafter there were no dealer organizational activities and Mr. Cohen stopped talking to other dealers. After six months a group comprised of petitioners Ash, Baron, Howland and Cohen and a Stan Smith met secretly for several years because of their fear of The Times Mirror Company. (CT 86-87).

In 1957 the aforementioned group surfaced and held a meeting at the Nik-a-Bob Restaurant in Los Angeles to which circulation manager Marx was invited. At that meeting the group discussed with Mr. Marx their grievances regarding arbitrary rate increases and territorial splits. After the meeting, however, Mr. Marx called Mr. Cohen into his office and discussed the activity of the group. In the presence of Mr. Roy Ryser, Mr. Marx threatened Mr. Cohen with termination if he engaged in organizational activities. (CT 87-88).

(c) 1964—Professor Van De Water Meeting

On April 29, 1964 at the El Rancho Golf Course Restaurant, petitioners Cohen and Howland and two dealers named George Goldfein and Brian Bumpas arranged for Professor John Van De Water, attorney, labor consultant and Professor of Law at U.C.L.A. law school, to speak on the topic of "Labor-Management Relationships and the Independent Status". Some 60 to 70 Los Angeles Times newspaper dealers attended the meeting and Mr. Van De Water's speech was enthusiastically received. (CT 68).

On May 25, 1964 the then circulation manager of the Los Angeles Times, Jack Underwood[4], called petitioners Cohen, Baron and Ash into his office. In the presence of respondent Bert R. Tiffany, Mr. Underwood stood looking out of his office window with his back to said petitioners. After remaining in that position for at least five minutes. Mr. Underwood turned, faced these petitioners and commenced a humiliating and abusive diatribe against them. He pointed to several envelopes on his desk stating that they were the petitioners' termination notices and whether or not he would hand them to them depended upon their immediate answers to his questions. He told said petitioners that what they had done could be likened to a "big nigger" going into a beautiful temple for the purpose of desecrating it and tearing

[4]In November 1964 Mr. Underwood left the Los Angeles Times to become circulation manager of the New York Daily News, the country's largest weekday circulation newspaper. Mr. Underwood's activities on behalf of the New York Daily News is the subject of a separate suit and an opinion by U.S. District Judge Arnold Bauman. *Bowen v. New York News, Inc.* (1973 Trade Cas.) ¶174,590 at 94,587 (S.D. N.Y. 1973).

it down into the dirt. He accused the petitioners of planning the Van De Water meeting for a time when he was sick and away from the office. Mr. Underwood said that The Times Mirror Company would not tolerate any organization of Los Angeles Times newspaper dealers, that petitioners were all aware of this Times policy of no-organization, and that if they persisted in forming a dealer organization they would all be terminated. (CT 92-93).

In addition to calling petitioners Cohen, Baron and Ash into his offce Mr. Underwood called a general meeting of all Los Angeles Times dealers at Eaton's Restaurant in Arcadia. After lunch, Mr. Underwood asked all waitresses to leave the room and the doors were closed. Mr. Underwood then commenced the meeting by stating, "If anyone in this room disagrees with me they will get their termination notice." He then proceeded to verbally tear apart petitioners Ash, Cohen and Baron for organizing the Professor Van De Water meeting. Mr. Underwood pointed at Messrs. Ash, Cohen and Baron and stated, "I am sick and tired of taking my handkerchief and wiping the drizzle off your noses." Mr. Underwood then discussed the Van De Water meeting and said he did not want any more of them. At this point a dealer named Brian Bumpas stood up and said, "Jack, I'm sure that you did not mean what you said about terminating anyone who disagrees with what you said. However, if that's the case, then to be terminated for what these men stand for would be meaningful." Mr. Bumpas stated that he was proud to be associated with Ash, Cohen and Baron, that the Times was

where it was because of men like these who built the foundation of the Times, and that he was proud to be at the Van De Water meeting. Mr. Bumpas then read to Mr. Underwood and the entire group the following thank you letter sent to Professor Van De Water:

May 8, 1964

"Dear D. Van De Water,

"Just a note of thanks from all the Los Angeles Times dealers to express our appreciation. We felt that your speech not only reflected a profound wealth of information but also a genuine desire to understand our purpose. We readily concur with your philosophy of 'Not Who But What.'

"Never has anyone aroused such an awareness of oneself as your positive presence did to us in regard to our position and the enlightenment of our status. It was a privilege and a pleasure to have met you and an education to have heard you.

"We repeat our steadfast loyalty to a great company, The Los Angeles Times, and our deep confidence within ourselves to grow and share with this company. After all, our roots are here, our sweat is here, and our hopes are here.

"Dr. Van De Water, thank you again for strengthening our true identity and worth. We are looking forward to having you visit with us at a future time.

"Sincerely,

"LOS ANGELES TIMES
INDEPENDENT DEALERS" (CT 73-75).

After his speech in defense of petitioners Ash, Cohen and Baron, Mr. Bumpas' relationship with the Los Angeles Times was never the same and he was thereafter the subject of discriminatory treatment. In September 1964 Mr. Bumpus was contacted by respondent Joe Cappone who informed him that the Times had decided to "split" his territory (i.e., take away part of his territory). The split became effective on November 2, 1964 and Mr. Bumpus was left with only a portion of his prior territory and a substantial loss of income. (CT 75).

(d) 1965-1966—The rise and fall of IDA

In the spring of 1965 a Los Angeles Times street dealer named Ray Encabo contacted Mr. Brian Bumpas and expressed his concern regarding the unstable economic condition of Los Angeles Times newspaper dealers. They then decided to discuss the matter further and Mr. Bumpas contacted petitioners Ash, Baron, Howland, Cohen and other Los Angeles Times street dealers for the purpose of arranging a meeting. A meeting was then held the following week at Mr. Encabo's home at which time it was decided to form an association of Los Angeles Times newspaper dealers for the purpose of advancing the economic interests of its members. At Mr. Bumpas' suggestion the association was named the Independent Dealers Association ("IDA"). (CT 75-76).

On May 26, 1965 IDA held its organizational meeting at Eaton's Restaurant at which time Mr. Encabo was elected president. On June 2, 1965 IDA sponsored

a meeting of Los Angeles Times dealers at Eaton's Restaurant to which respondent Bert Tiffany, circulation manager, was invited. He came along with two of his assistants, respondents Steve Ratkovich and Lloyd Spence. At the meeting a variety of subjects were discussed all of which pertained to economic improvements for the independent Times dealers. The meeting was adjourned after 4 hours and 20 minutes. A number of IDA meetings followed culminating in a meeting on January 19, 1966 at which time Mr. Bumpas gave a moving address on "Independent Dealers Association and its purpose." (CT 94).

During the period of IDA's existence in 1965 petitioner Arnold was a senior member of the management of the Los Angeles Times circulation department. He avers as follows as to what was happening on the inside:

> "Each week on Monday, at 9:00 o'clock a.m. the senior members of management in the circulation department and the division managers met to discuss various department problems. One of the topics discussed during the last six months of 1965 while I was home delivery manager was an organization of Los Angeles Times dealers called 'Independent Dealers Association' (commonly referred to as 'IDA') which had been formed by certain Los Angeles Times street sale dealers in May 1965. Also discussed in connection with IDA were Brian Bumpas, Robert W. Ash, Abraham Baron and Horace W. Howland, Los Angeles Times street sale dealers who were part of the leadership of IDA. I recall that at these meetings Mr. Tiffany stated that a dealer organization was

detrimental to the best interests of the Los Angeles Times, that the Los Angeles Times would lose control of its independent dealers if IDA got stronger, and that he would get rid of Bumpas, Ash, Howland and Baron, if necessary, in order to kill IDA. Mr. Tiffany expressed harsh criticism of Messrs. Bumpas, Ash, Howland and Baron for their activities on behalf of IDA. It was the consensus of the senior members of management that Brian Bumpas was the original instigator of IDA and the most active of its members." (CT 116-117).

Following the meeting on January 19, 1966 at which Mr. Bumpas spoke, respondent Wes Spaulding began fomenting dissention among the IDA membership and Mr. Ray Encabo resigned as president and withdrew from the organization. (CT 76).

On February 10, 1966 Mr. Bumpas was called into the office of respondent Tiffany. He was not informed ahead of time of the purpose of this meeting. In the presence of respondent Steve Ratkovich Mr. Tiffany stated, "Brian, I understand your are unhappy with your dealership and so we are going to help you out by terminating you." Mr. Bumpas responded, "I thought you called me in to compliment me on something I did or answer the letter I wrote to Steve." Mr. Tiffany then walked around his desk and tried to hand Mr. Bumpas an envelope which he knew contained his letter of termination. Mr. Bumpas refused it. Mr. Tiffany tossed it on Mr. Bumpas' lap. Mr. Bumpas tossed it back on Mr. Tiffany's desk and got up to leave. Mr. Tiffany said, "Don't forget your

letter." Mr. Bumpas replied, "I don't want to touch it" and left the office. (CT 76).

Also on February 10, 1966 Mr. Tiffany summoned petitioners Ash, Baron and Cohen to his office. He met with each of them individually. He told each of them that The Times Mirror Company would no longer tolerate an organization of Los Angeles Times dealers, that Mr. Underwood had warned them when he was circulation manager to discontinue dealer organization activities, that he was going to give them one more chance, that they were to have nothing to do with any dealer organization in the future, that it was absolutely against The Times Mirror Company policy to permit a dealer organization, that it must be stopped and that they would be terminated as dealers if they had anything to do with a dealer organization in the future. (CT 94, 89-90, 70).

In his affidavit petitioner Arnold explains the reason for Mr. Bumpas' termination as follows:

> "From time to time when a serious or confidential matter was to be discussed Mr. Tiffany would meet in his office with just senior management or certain members of senior management. I recall that shortly before I left the Los Angeles Times in December 1965 I met with Mr. Tiffany and Mr. Ratkovich in Mr. Tiffany's office. At that time Mr. Tiffany said he was quite upset at Mr. Brian Bumpas because of his association with IDA. Mr. Ratkovich said he felt the same way. Mr. Tiffany further stated he wanted to get rid of Mr. Bumpas because of his involvement in IDA and that this would be a good way to 'kill' the IDA group. Mr. Ratkovich agreed. Mr. Tif-

fany and Mr. Ratkovich both indicated that it was too bad that they were going to have to terminate Mr. Bumpas because he was such a good Times dealer and that it would be easier if he was not a good dealer. Mr. Tiffany finally stated that Mr. Bumpas will be terminated since no reason is required according to his contract with the Times." (CT 117).

After February 10, 1966, IDA held its last get-together on February 14, 1966 which was a Valentine dinner dance of Times dealers. It was a glum party. Thereafter, IDA never met again and the Los Angeles Times, defender of the constitutional rights of the press, had destroyed for many years the constitutional rights of its independent dealers to get together for peaceable purposes. (CT 76).

After the demise of IDA respondent Lloyd Spence, street sale division manager of the Los Angeles Times, stated to petitioner Warren Churchill, an emplyee of the Times at the time, that he did not trust petitioner Ash, that he was no good because he was a ringleader in IDA, that the Times would be better off without Ash and that he would like to get something on Ash so that they could get rid of him once and for all. In order to try and get something on Ash a Los Angeles Times truck was sent to pick up his unsold newspapers which he returned for credit. The papers were brought to the Los Angeles Times garage and petitioner Churchill was instructed to count the number of newspapers in each bundle and locate any incomplete newspapers. Mr. Churchill found nothing

improper about Mr. Ash's unsold newspapers. (CT 101).

(e) 1971—AAIND

On October 11, 12, 1971 the first national convention of the American Association of Independent News Distributors ("AAIND") was held in San Francisco at the Chinatown Holiday Inn. Invitations were sent to independent newspaper dealers throughout the country. In southern California a group of Los Angeles Times dealers including petitioner Churchill decided to meet on October 5, 1971 at the Northwoods Inn in San Gabriel for the purpose of discussing the possibility of some of them going to San Francisco to attend the convention. Approximately 16 to 18 Times dealers attended. After being seated at a table reserved for the group they noticed that David J. Stevens, Los Angeles Times home delivery manager, and Paul McClanahan, Los Angeles Times district manager, were seated at a table next to them. The Northwoods Inn is located approximately 15 miles from Mr. Stevens' office at The Times Mirror Building. Because of the presence of Messrs. Stevens and McClanahan the group decided not to discuss the convention and they adjourned after lunch (CT 102-03).

On the following day respondent Bert R. Tiffany, circulation manager of the Times, visited petitioner Churchill at the latter's office and asked him why the Times dealers had met the previous day at the Northwoods Inn. Mr. Churchill explained that the purpose

was to discuss the possibility of some of them attending the San Francisco convention. Mr. Tiffany then told Mr. Churchill that Times dealers should not associate with other independent news dealers, particularly news dealers from northern California, that the problems of the northern California dealers were unique and had no relation to Times dealers, and that if Times dealers had problems they should contact him. (CT 103-04).

As a result of Mr. Tiffany's visit to his office, the presence of Messrs. Stevens and McClanahan at the Northwoods Inn meeting and his awareness of the tactics of respondent Spence in trying to dig up something on petitioner Ash because of his involvement in IDA, petitioner Churchill did not attend the AAIND convention. (CT 104).

A Los Angeles Times independent dealer named Baker Wilhelm did attend the San Francisco convention of AAIND as a spy for respondents and reported back to Mr. Tiffany what occurred at this convention and the names of any Times dealers who attended the convention. (Vol. 2, RT 13-14).

(f) 1972-1973—Southern California Chapter of CAIND

The California Association of Independent News Distributors ("CAIND") is a nonprofit corporation organized on November 5, 1970, whose specific and primary purpose is to initiate, sponsor, promote and carry out plans, policies, and activities that will tend to better the conditions of independent newspaper dealers serving California and Nevada, to improve

the quality of service and create increased circulation and good will for the newspapers distributed by said dealers, and to develop a higher degree of efficiency in the operations of said dealers. The association is dedicated to the rule of law and is opposed to strikes, boycotts and other coercive activities. It does not desire to engage in collective bargaining with publishers. All that it requests of the publishers is that they respect the laws of the United States and the laws of the State of California and Nevada in their dealings with independent newspaper dealers. (CT 95-96).

Prior to March 1972 CAIND had three chapters: Sacramento, San Francisco and Marin-Sonoma. On March 29, 1972 CAIND held a symposium in Anaheim, California and established a Southern California Chapter consisting of 16 Times dealers. Following this meeting respondent Tiffany wrote a letter dated May 4, 1972 to all Los Angeles Times dealers stating the following:

> "TIMES DEALERS:
>
> "As you know, an effort is being made by Northern California representatives of a newspaper dealers association to extend its activities to independent dealers here in Southern California. Some Los Angeles Times dealers have asked what The Times thinks of this association.
>
> "The Los Angeles Times is opposed to Times dealers becoming involved in this association. The essence of your operations as independent dealers is that you are able to act individually

as independent businessmen and to deal independently with The Times. Membership in this association could only result in a loss of much of the independence and freedom of action which you now enjoy.

"We think, too, that our practice of discussing your problems with each of you independently and individually has with few exceptions resulted in our being able to find mutually acceptable solutions. We shall continue to do so with the knowledge that as you are successful then The Times will be successful.

"We feel that Times dealers becoming involved in this association not only would be unnecessary but could cause friction and new problems and impair the good relationships which now exist between us. Furthermore, you should know that The Times would have no obligation to, and in fact would not, deal with this association.

"For these reasons we hope in your own best interests you will not extend to this association any indication of support or encouragement.

"If you have any questions at all on this subject, please do not hesitate to contact me.

"Sincerely,
(signed) "Bert Tiffany" (CT 119-20).

On May 10, 1972 the Southern California Chapter of CAIND held a seminar at the Roger Young Convention Center in Los Angeles. On June 28, 1972 this chapter held its third meeting at which time officers and directors were elected. Petitioner Floyd W. Mc-

Kinsey was elected president and petitioner William D. Arnold was elected vice president.[5] (CT 120).

Since the advent of the Southern California Chapter the respondents have brought to bear all of their power to destroy this organization. The complaint alleges that respondents have bribed Los Angeles Times dealers into not joining or participating in the organization through offering financial inducements—particularly the reduction of the wholesale rate paid for copies of the Los Angeles Times. (CT 9). On January 29, 1973 petitioner Arnold was terminated as a Times dealer because of his leadership in the dealer association. Also on January 29, 1973 respondent Joe Capponi was appointed District Manager over petitioner Floyd W. McKinsey, president of the chapter, in order to dig up evidence to support respondents' desire to terminate McKinsey as a Times dealer. (CT 10). Respondent Spaulding was supplied by the Times Mirror Company with an up-to-date mailing list of Times dealers' addresses and phone numbers for the purpose of fomenting fear and dissention among Times dealers. (Vol. 2, RT 21). At the present time the respondents' campaign of intimidation and harassment has reached a new high with threats of replacing all Los Angeles Times independent dealers (over 400 in number) with employees.

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[5]All of the facts set forth up to this point were never controverted by respondents although they filed extensive affidavits (CT 171-178, 181-188, 236-308).

REASONS FOR GRANTING THE WRIT

A complaint cannot be dismissed on the grounds of failure to state a claim upon which relief can be granted, unless it is apparent beyond a doubt that petitioners cannot prove any set of facts in support of their claim which would entitle them to relief. *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *York v. Story,* 324 F.2d 450 (9th Cir. 1963), cert. denied, 376 U.S. 939 (1964).

For the purposes of a motion to dismiss under Federal Rules of Civil Procedure 12(b)(6) the allegations of the complaint and supporting affidavits are taken as true. 2A Moore, Federal Practice ¶12.08, at 2266-67 (2d Ed. 1972). *Gardner v. Toilet Goods Ass'n,* 387 U.S. 167, 172 (1967); *California Motor Transport Co. v. Trucking Unlimited,* 92 S. Ct. 609 (1972).

The controlling case on the interpretation of Title 42, Section 1985(3) is *Griffin v. Breckenridge,* 403 U.S. 88, 91 S.Ct. 1790 (1971). There, this Court held that Section 1985(3) reached private conspiracies but was not intended to apply to all tortious, conspiratorial interferences with the rights of others. The test for the application of Section 1985(3) is whether there is "some racial or perhaps otherwise class-based, invidiously discriminatory animus" behind the conspirators' actions. This case raises the extremely important question, undecided by this Court, whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under §1985(3). *Id.,* at 102, fn. 9.

The District Court read the words "class-based, invidiously discriminatory animus" to refer, at most, to that kind of irrational and odious class discrimination akin to racial bias such as discrimination based on national origin or religion. *Appendix A.* Since petitioners' complaint alleged no such discrimination the District Court dismissed the complaint.

The Court of Appeals affirmed but on another ground. It held that the animus or intent was not class-based but "directed at and derived from the dealer association." *Appendix B.*

For the reasons hereinafter set forth petitioners contend that both the District Court and the Court of Appeals erred in their interpretation of §1985(3) and that this Court should grant the petition in order to settle an important question of federal law.

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1. SECTION 1985(3) REACHES CONSPIRACIES MOTIVATED BY INVIDIOUSLY DISCRIMINATORY INTENT OTHER THAN RACIAL BIAS.

In *Griffin v. Breckenridge, supra* at 100 the Court went to the legislative history to explain the animus or motivation that would be required to state a cause of action under Section 1985(3):

> "Representative Willard, draftsman of the limiting amendment, (Section 1985(3)) said that his version provided that the essence of the (prohibition) should consist in the intent to deprive a person of the equal protection of the laws and of equal privileges and immunities under the laws; in other words, that the Constitution secured, and

> was only intended to secure, equality of rights and immunities, and that we could only punish by United States laws a denial of that equality. . . . Representative Shellabarger's explanation of the amendment was very similar: 'The object of the amendment is . . . to confine the authority of this law to the prevention of deprivations which shall attack the equality of rights of American citizens; that any violation of the rights, the animus, and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights, shall be within the scope of the remedies of this section.' "

The Court in *Griffin* referred to Congressional testimony during the debates preceding passage of the 1871 limiting amendment, that is, Section 1985(3), as an indication of the type of invidiously discriminatory motivation intended to be reached by the statute. At page 102, note 9, the Court referred to the remarks of Senator Edmunds. Said remarks went as follows:

> " 'We do not undertake in this bill to interfere with what might be called a private conspiracy growing out of a neighborhood feud of one man or set of men against another to prevent one getting an indictment in the state courts against men for burning down his barns; but, if in a case like this, it should appear that this conspiracy was formed against this man because he was a Democrat . . . or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter, . . . then this section could reach it.' Cong. Globe, 42d Cong., 1st Sess., 567 (1871)." 403 U.S. at 102.

The aforesaid reference clearly indicates that the Court in *Griffin* recognized that a strict racial discrimination limitation on the application of Section 1985(3) was not intended by Congress. Since the Court stated that its decision intended to give effect to the congressional purpose for the enactment of Section 1985(3), it is reasonable to conclude that a class discrimination based on factors other than race will be within the statute.

It should be noted that the Sixth Circuit in the case of *Azar v. Conley,* 456 F.2d 1382 (6th Cir. 1972), held that a complaint filed by a white middle class family, who were not members of a racial or ethnic minority group, was sufficient under Section 1985(3) to withstand a motion to dismiss. The court noted that although the Supreme Court in *Griffin* did not rule on whether the protection of Section 1985(3) extends to persons who are not members of a racial minority, it is not unreasonable to assume that Section 1985(3) extends to blacks, other racial minorities and *any person* or group that is the object of invidious discrimination.

At pages 1386 and 1387, the court in *Azar* stated in footnote 5:

> "As we noted at the outset, the Azars are not members of a minority racial group but rather a middle class white family. Whether or not the protection of Section 1985(3) extends to them has not yet been determined by the Supreme Court. In *Griffin v. Breckenridge, supra,* the Court stated:

'We need not decide, given the facts of this case, whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under the portion of § 1895(3) before us. Cf. Cong. Globe, 42d Cong., 1st Sess. 507 (1871) (remarks of Senator Edmunds).' 403 U.S. at 102, 91 S.Ct. at 1798.

"Because this issue has not been raised and was not decided by the district court, we are not called upon to express an opinion at this time. It is however, appropriate at this juncture to emphasize the wording of the statute. The Act forbids any conspiracy 'for the purpose of depriving . . . *any person or class of persons* of the equal protection of the laws . . .' While it is true, as the legislative history reveals, that the Civil Rights Act of 1871 was immediately aimed at the protection of blacks in the South after the Civil War, Congress chose the words 'any person or class of persons.' It is not unreasonable, therefore, to assume that the protection of Section 1985(3) extends not only to blacks and other racial minorities but to *any person* or group that is the subject of invidious discriminations."

In addition, it should be pointed out that the Civil Rights Act 1871, known as the Ku Klux Act, was aimed at controlling the depredations of the Klan which were directed against "Negroes primarily and to a lesser, but significant degree against Northern whites and against those Southern whites who had been disloyal to their states by being loyal to the Union." Frantz, Congressional Power to Enforce the

Fourteenth Amendment Against Private Acts, 73 Yale L.J. 1353, 1354-55 (1964).

In *Kletschtka v. Driver,* 411 F.2d 436 (2d Cir. 1969), the Second Circuit in a case decided prior to *Griffin* recognized in dicta that a cause of action under Section 1985(3) may be based upon a pattern of discrimination not involving improper racial categories. The Court stated:

> "But whatever other rights plaintiff may have been deprived of equal protection is not one of them. The actions taken by defendants were directed only against plaintiff as an individual and not because he was a veteran, or a member of some class or race. *A violation of equal protection would be shown if the actions against plaintiff were part of a general pattern of discrimination, or were based on impermissible considerations of race or class,* but plaintiff has not raised a genuine issue of fact concerning such discrimination. See *Birnbaum v. Trussel,* 371 F.2d 672 (2d Cir. 1966); *Birnbaum v. Trussel,* 347 F.2d 86, 90 (2d Cir. 1965)." [Emphasis added] 411 F.2d at 447

The definition of the words "invidious discrimination" does not denote a racial or other limited classification as suggested by the District Court. "Invidious is defined by Webster's Third New International Dictionary of the English Language, 1966 Edition, as "detrimental to reputation: defamatory; likely to cause discontent, animosity or envy; full of envious resentment; of an unpleasant or objectionable nature, hateful; obnoxious; causing harm or resentment: in-

jurious: hateful." Thus, the word invidious describes the intensity of the discrimination rather than the object of the envy, hatred, etc.

The definition of "discrimination," likewise, places no racial or ethnic limitations upon its application. Webster's defines "discrimination" as "the making or perceiving of a difference or distinction; the act, practice or an instance of discriminating categorically rather than individually." Only as a sub-definition of the fourth definition does Webster's define discrimination as "the according of differential treatment to persons of an alien race or religion."

It is apparent that neither the *Griffin* decision nor the legislative history of section 1985(3) nor the definition of the words, "invidious discrimination" themselves limits Section 1985(3) to discrimination based upon race.

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2. SECTION 1985(3) IS NOT LIMITED TO SOLELY SUSPECT CLASSIFICATIONS AS CONSTRUED BY THE DISTRICT COURT.

The decision of this Court in *Griffin* suggests no limitation on the application of the statute to the types of classes which would be the object of the invidiously discriminatory animus. In *Jones v. Alfred H. Mayer Company,* 392 U.S. 409 (1968) this Court set the tone for future judicial construction of the Civil Rights Acts of 1866:

> "As we said in a somewhat different setting two Terms ago, 'We think that history leaves no doubt that, if we are to give [the law] the scope that

> its origins dictate, we must accord it a sweep as broad as its language.' *United States v. Price,* 383 U.S. 787, 801, 86 S.Ct. 1152, 1160. . . ." 392 U.S. at 437.

The "broad sweep" construction of the Civil Rights Acts of 1866 by the *Jones* court has been followed in *Sullivan v. Little Hunting Park,* 396 U.S. 229, 237, 90 S.Ct. 400 (1969). There, Mr. Justice Douglas, for the court, declared:

> "A narrow construction of the language of Section 1982 would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded by Section one of the Civil Rights Act of 1866, 14 Stat. 27, from which Section 1982 was derived . . ."

In *Lynch v. Household Finance Corp.,* 405 U.S. 538, 549, 92 S.Ct. 1113, 1120 (1972), the Court applied the same "broad sweep" construction to the Civil Rights Act of 1871, which reenacted the Civil Rights Act of 1866. Similarly, the *Griffin* Court stressed that the "approach of this court to other reconstruction civil rights statutes in the years since *Collins* has been to 'accord them a sweep as broad as their language.'" 403 U.S. at 97. Indeed, both the District Court and the Court of Appeals in this case clearly failed to heed the admonition in *United States v. Price,* 383 U.S. 787, 801, 86 S.Ct. 1152 (1966), that:

> "We are not at liberty to seek ingenious analytical instruments to avoid giving a congressional enactment the scope that its language and origins require."

Furthermore, in suits under the Civil Rights Acts requiring "state action" there are no artificial limitations that such Acts apply only to discrimination based upon race, religion, national origin, age or sex. In *Hague v. C.I.O.*, 307 U.S. 496, 59 S.Ct. 954 (1939), the Supreme Court found that the First Amendment right to assemble was protected against state interference. *Hague* did not involve discrimination against a class of persons on the basis of race, national origin, age, religion or sex. The class of persons against whom the discrimination was directed was an organization of workers and labor unions. There was no allegation by the respondents in that case that the discrimination was directed against them because of race, national origin, religion, age or sex.

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3. THE COURT OF APPEALS' RATIONALE IS CONTRARY TO GRIFFIN

The Court of Appeals' rationale in this case runs completely counter to this Court's reasoning in *Griffin*. As the facts make clear in *Griffin* R. G. Grady of Memphis, Tennessee was travelling upon the federal, state and local highways in and about DeKalb, Mississippi, performing various errands and visiting friends and "defendants, acting under a mistaken belief that R. G. Grady was a worker for Civil Rights for Negroes, wilfully and maliciously conspired, planned, and agreed to block the passage of said plaintiffs in said automobile upon the public highways,

to stop and detain them and to assault, beat and injure them with deadly weapons." 403 U.S., at 90. Thus, the racial animus in *Griffin* arose not because the plaintiffs were black or that the plaintiffs were black and running errands and visiting friends but because the plaintiffs were believed to be engaged in Civil Rights for Negroes. The animus was directed at and derived from the activities of the plaintiffs in *Griffin*. The same situation exists in the present case except the plaintiffs in the instant case are in essence engaged in Civil Rights for Los Angeles Times independent newspaper dealers. The holding of the Court of Appeals in this case means that the plaintiffs in *Griffin* would have no cause of action because the animus in *Griffin*, to paraphrase the Court of Appeals below, "is directed at and derived from the [Civil Rights Activities] and is divorced from the fact that there is a class of [blacks]." See Appendix B, pages x-xi.

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4. SECTION 1985(3) IS CONSTITUTIONAL AS APPLIED TO THE FACTS OF THIS CASE

In *Griffin v. Breckenridge, supra,* at 105-06 Mr. Justice Stewart pointed out:

> "Our cases have firmly established that the right of interstate travel is constitutionally protected, does not necessarily rest on the Fourteenth Amendment, and is assertable against private as well as governmental interference. *Shapiro v. Thompson,* 394 U.S. 618, 629-631, 89 S.Ct. 1322, 1328-1330, 22 L.Ed.2d 600; *Id.,* at 642-644, 89 S.Ct., at 1335-1336 (concurring opinion); *United*

States v. Guest, 383 U.S. 745, 757-760 and n. 17, 86 S.Ct. 1170, 1177-1180, 16 L.Ed.2d 239; *Twining v. New Jersey,* 211 U.S. 78, 97, 29 S.Ct. 14, 18, 53 L.Ed. 97; *Slaughter-House Cases,* 16 Wall. 36, 79-80, 21 L.Ed. 394; *Crandall v. Nevada,* 6 Wall. 35, 44, 48-49, 18 L.Ed. 744; *Passenger Cases* (*Smith v. Turner*), 7 How. 283, 492, 12 L.Ed. 702 (Taney, C.J., dissenting). The 'right to pass freely from state to state' has been explicitly recognized as 'among the rights and privileges of national citizenship.' *Twining v. New Jersey, supra,* 211 U.S. at 97, 29 S.Ct. at 19. *That right, like other rights of national citizenship, is within the power of Congress to protect by appropriate legislation. E.g., United States v. Guest, supra,* 383 U.S., at 759, 86 S.Ct., at 1178; *United States v. Classic,* 313 U.S. 299, 314-315, 61 S.Ct. 1031, 1037-1038, 85 L.Ed. 1368; *Ex parte Yarbrough,* 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274; *Oregon v. Mitchell,* 400 U.S. 112, 285-287, 91 S.Ct. 260, 345-346, 27 L.Ed.2d 272 (concurring and dissenting opinion)." (Emphasis added)

In the concurring opinion of Mr. Justice Stewart in *Shapiro v. Thompson,* 394 U.S. 618, 89 S.Ct. 1322 (1969, cited by the Court in *Griffin,* Mr. Justice Stewart compared the right of interstate travel to that of the right of association, stating that both were virtually unconditional personal rights, guaranteed by the Constitution to us all:

"'(T)he right to travel freely from State to State finds constitutional protection that is quite independent of the Fourteenth Amendment.' *United States v. Guest, supra,* at 769, 86 S.Ct. at 1179, n. 17. As we made clear in *Guest,* it is a

> right broadly assertable against private interference as well as governmental action. *Like the right of association, NAACP v. Alabama,* 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488, *it is a virtually unconditional personal right, guaranteed by the Constitution to us all.*" (Emphasis added) 394 U.S. at 643, 89 S.Ct. 1336.

In *Hague v. C.I.O., supra,* the Court found that the Fourteenth Amendment secured against state abridgement the right to peaceably assemble and discuss topics of mutual interest. The Court recognized that such privileges were inherent in citizenship of the United States which the amendment protects stating:

> ". . . it is clear that the right peaceably to assemble and to discuss these topics, and to communicate respecting them, whether orally or in writing, is a privilege inherent in citizenship of the United States which the Amendment protects." 307 U.S., at 512.

Accordingly, since the right of association is a right of national citizenship within the power of Congress to protect by appropriate legislation Section 1985(3) can be constitutionally applied to the actions of the respondents herein.[6]

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[6]There are no more cherished rights of the people of this nation than the First Amendment freedoms of speech, association and assembly. *DeJonge v. State of Oregon,* 299 U.S. 353, 364 (1937); *N.A.A.C.P. v. Alabama,* 357 U.S. 449, 460-61 (1958); *Griswold v. Connecticut,* 381 U.S. 479, 483 (1965). In today's economy of corporate states with budgets larger than any of the 50 states these rights can be just as seriously curtailed by these corporate entities as by the states.

A second source of Congressional power is section five of the Fourteenth Amendment. In *Action v. Gannon,* 450 F.2d 1227 (8th Cir. 1971), the Eighth Circuit in an *en banc* opinion issued an injunction under Section 1985(3) which enjoined organizations purporting to act on behalf of black citizens of St. Louis from continuing to disrupt religious services of a predominantly white Catholic parish. The opinion of the Eighth Circuit points out that the defendants were stimulated to disrupt the church services by racial and *economic* motives. The court states that the premise underlying the selection of *Action's* targets is that these churches have substantial amounts of money, the use of which Action hoped to control for the benefit of economically deprived black people.

Analyzing *Griffin,* the court in *Action* noted that the *Griffin* Court had found a source of power to grant relief in those sections of the Constitution which protect a citizen's right to travel interstate. 450 F.2d at 1233. Then the *Action* court took the view that Section 1985(3) created substantive rights, which rights could be protected from private conspiracies under Sections one and five of the Fourteenth Amendment. The *Action* court had no difficulty in concluding that the Fourteenth Amendment protected the plaintiffs' First Amendment rights of freedom of assembly and worship. 450 F.2d at 1234-1235.

In support of its theory that Section 1985(3) created substantive rights, the *Action* court relied on *United States v. Guest,* 383 U.S. 745, 86 S.Ct. 1170 (1966). In *Guest,* six justices expressed the view that

Congress has power under Section five of the Fourteenth Amendment to punish private conspiracies that interfere with Fourteenth Amendment rights. 450 F.2d at 1235. The *Action* court squarely acknowledged that *Griffin* had left the door open for reexamination of *Guest* and its theory of the creation of substantive constitutional rights through Section five of the Fourteenth Amendment:

> "While the court in *Griffin* left the door open for a reexamination of *Guest,* we do not believe that it will reject the majority views expressed therein. The Fourteenth Amendment and Section 1985(3), construed in *Griffin,* are too closely related with respect to date of passage, authorship, and purpose to permit such result with consistency.
>
> "Furthermore, the court's decisions in a number of recent cases reveal a purpose to protect the constitutional rights of citizens against private invasion by expanding the concept of State action to situations where the showing of such action would, at another time, have been considered insufficient." 450 F.2d at 1236.

Thus, a second source of Congressional power is section five of the Fourteenth Amendment.[7]

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[7]While *Dombrowski v. Dowling,* 459 F.2d 190 (7th Cir. 1972) is to the contrary of *Action v. Gannon, supra* re section five of the Fourteenth Amendment being a source of Congressional power, the *Dombrowski* Court cited with approval Mr. Justice Stewart's concurring opinion in *Shapiro v. Thompson, supra.* 459 F.2d, at 195, fn. 12.

5. THE INSTANT CASE PRESENTS A FACT QUESTION FOR THE JURY

This case is more than just a case of one businessman declining to do business with another businessman. It represents more than just a private conspiracy of one man or set of men against another. Rather, it is a case of the biggest of the 20 "public" companies that publish newspapers engaged in a long standing conspiracy continuing up to the present to deprive on a class wide basis over 400 independent small businessmen of the very basic rights, taken for granted by most Americans, to meet together, exchange ideas, listen to speakers and form, join, participate and maintain an association of their choice.[8]

Throughout the hearings in the District Court petitioners' argued that it was a question of fact whether or not the acts of respondents constituted a "class-based, invidiously discriminatory animus" and requested an evidentiary hearing to demonstrate a depth of feeling of contempt and hatred of the class by the individual respondents analogous to racism and bigotry.

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[8]The protections of the National Labor Relations Act are not applicable herein because the class consists of "independent contractors" and not employees. Section 2(3) of the National Labor Relations Act exempts independent contractors from the definition of employee. *Brown v. NLRB*, 462 F.2d 699 (9th Cir. 1972).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated, January 21, 1974.

Respectfully submitted,

G. Joseph Bertain, Jr.,
Timothy H. Fine,
W. Thomas Amen,
Thomas R. Sheridan,
Wallace L. Rosvall,
Simon, Sheridan, Murphy,
Thornton & Hinerfeld,
Attorneys for Petitioners.

(Appendix Follows)

Appendix A

United States District Court
Central District of California

Civil No. 73-312-HP

William D. Arnold, et al.,
Plaintiffs,

vs.

Bert R. Tiffany, et al.,
Defendants.

MEMORANDUM AND ORDER GRANTING MOTION TO DISMISS

The plaintiffs—seventeen in number—are independent news dealers who distribute The Los Angeles Times pursuant to individual written agreements with The Times Mirror Company. The defendants are The Times Mirror Company, seven of its employees, and Wes Spaulding, a Los Angeles Times dealer.

The complaint for injunctive relief and damages basically asserts that defendants have violated 42 U.S.C. §§ 1981, 1982 and 1985(3) by conspiring to deprive plaintiffs of their right to peaceably assemble for the purpose of forming and maintaining a newspaper dealers' trade association.

On February 26, 1973, the Court heard oral argument on plaintiffs' motion for preliminary injunction. The matter was continued to February 27th for an informal conference with the Court to discuss means

of expediting the hearing on plaintiffs' motion in light of their request that the Court hear testimony of numerous witnesses. At that conference, counsel for defendants stated that to test the legal sufficiency of the complaint they intended to file a motion to dismiss under F. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. Pursuant to an agreement between the Court and counsel, that motion, focusing on the crucial question of the applicability of §1985(3), was set for hearing on March 2, 1973.

The applicability of § 1985(3) is crucial to plaintiffs' claim because it is clear, as plaintiffs' counsel acknowledged, that the cases have shown that §§ 1981 and 1982 are limited to instances of racial discrimination. *Jones v. Mayer Co.*, 392 U.S. 409, 88 S. Ct. 2186 (1968); *Sullivan v. Little Hunting Park,* 396 U.S. 229, 90 S. Ct. 400 (1969); *Marshall v. Plumber and Steamfitters Local Union 60,* 343 F. Supp. 70 (E.D.La. 1972); *Schetter v. Heim,* 300 F. Supp. 1070 (E.D.Wisc. 1969). No such discrimination is asserted in the complaint.

Defendants' motion to dismiss pursuant to F. R. Civ. P. 12(b)(6) was heard by the Court on March 2, 1973. For the purpose of ruling on the motion the Court considers as admitted "the well-pleaded material allegations of the complaint." 2A Moore's Federal Practice ¶ 12.08. Having studied the pleadings, the briefs, and the pertinent authorities, and having heard the arguments of counsel, the Court has concluded that plaintiffs' complaint fails to state a claim for relief under §§ 1981, 1982, and 1985(3).

The case that controls the disposition of defendants' motion is *Griffin v. Breckenridge,* 403 U.S. 88, 91 S.Ct. 1970 (1971).

In *Griffin* the Court held that § 1985(3) did apply to private conspiracies. The Court, however, carefully limited its holding by stating: "That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others. * * * The constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose—by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment." (References omitted). *Griffin, supra,* at 101, 102, 91 S.Ct. at 1798.

The Court then explained that "[t]he language [used by the sponsors of the limiting amendment] requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' actions."[1] Id. (Emphasis in original).

In short, "[t]he motivation aspect of § 1985(3) focuses * * * on invidiously discriminatory animus." Id. at note 10. Plaintiffs do not claim that defendants were motivated by racial animus. The critical question

[1]"We need not decide, given the facts of this case, whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under the portion of §1985 (3) before us." *Griffin, supra* at 102, n.9, 91 S. Ct. at 1798 (footnote renumbered) (citations omitted).

which this Court must then decide is what other "kind of invidiously discriminatory motivation"—in addition to racial bias—did the Court have in mind when it used the words "class-based, invidiously discriminatory animus."

A close reading of *Griffin* leads to this Court to conclude that the words "class-based, invidiously discriminatory animus" refer, at most, to that kind of irrational and odious class discrimination akin to racial bias—such as discrimination based on national origin or religion. The complaint alleges no such discrimination.

Furthermore, for this Court to conclude that § 1985 (3) was intended to embrace the class urged here—a newspaper dealers' trade association—would, in effect, amount to treating that section as a general federal tort law.

Accordingly, defendants' motion to dismiss under F. R. Civ. P. 12(b)(6) is granted, plaintiffs' pending motion for injunctive relief is denied, and the complaint is dismissed.

The Clerk of the Court shall serve copies of this Memorandum and Order, by United States mail, or personally, upon the attorneys of record for the parties appearing in this cause.

Dated: March 5, 1973.

/s/ Harry Pregerson
Harry Pregerson
United States District Judge

Appendix B

United States Court of Appeals
for the Ninth Circuit

William D. Arnold, Floyd W. McKinsey, Abraham Baron, Warren H. Churchill, Robert W. Ash, Horace W. Howland, Charles McGuire, Robert Cohen, Paul Lee Bluff, Steven Z. Krstich, Michael Maleta, Angelo J. Masi, Rudolph C. De Luna, W. H. Hopkins, Patrick J. Germon, James C. Dennis, James Nelson Hopkins, Plaintiffs-Appellants, vs. Bert R. Tiffany, Stephen Ratkovich, Lloyd Spence, Harry L. Clarke, Joe Capponi, Robert D. Nelson, Vance L. Stickell, The Times Mirror Company, Wes Spaulding, Defendants-Appellees.	No. 73-1404

[October 25, 1973]

Appeal for the United States District Court
for the Central District of California

Before TUTTLE,* MERRILL and BROWNING
Circuit Judges.

TUTTLE, Circuit Judge:

Appellants, seventeen independent news dealers who distribute the Los Angeles Times under individual

*Of the Fifth Circuit, sitting by designation pursuant to 28 U.S.C. §294(d) (1970).

contracts with the Times Mirror Company, appeal the district court's dismissal pursuant to Fed. R. Civ. P. 12(b)(6) of their claims under 42 U.S.C. §1981, §1982, and §1985(3).

FACTS

The plaintiffs seek injunctive relief and damages for violations of the Civil Rights Act, Sections 1981, 1982, and 1985(3). The plaintiffs allege that the defendants, who are various officers and employees of the publisher of The Los Angeles Times and one other independent newspaper dealer, "have conspired with invidiously discriminatory animus to deprive on a classwise basis the Los Angeles Times newspaper dealers including plaintiffs of the equal protection of the laws through intimidating, harassing, causing economic injury and coercing said dealers from exercising their rights under the first and fourteenth amendments to the United States Constitution to peaceably assemble." Such conspiratorial conduct is alleged to have been taken to prevent plaintiffs from forming and maintaining a newspaper dealers' trade association.

On February 26, 1973, the district court heard oral argument on plaintiffs' motion for preliminary injunction. At an informal conference the next day in which the matter was continued, the counsel for defendants stated their intent to file a motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted in order to test the legal sufficiency of the complaint. Since plaintiffs' counsel acknowledged that the case law showed that Sections 1981 and 1982 are limited to instances of ra-

cial discrimination, sufficiency of the cause of action under Section 1985(3) was deemed decisive. The district court and counsel agreed that the motion should focus on the crucial question of the applicability of Section 1985(3).

For the purpose of ruling on the motion pursuant to Fed. R. Civ. P. 12(b)(6) the district court considered as admitted "the well pleaded material allegations of the complaint." Having considered the pleadings and briefs and heard the arguments of counsel, the district court concluded that plaintiffs' complaint failed to state a claim for relief under Sections 1981, 1982, and 1985(3).

LAW

The issue on appeal is whether the district court erred in dismissing plaintiffs' complaint on the ground that the actions of the publisher of the Los Angeles Times and others in conspiring to prevent through economic reprisals the independent newspaper dealers for the Los Angeles Times from forming and maintaining an association of independent newspaper dealers did not state a cause of action under 42 U.S.C. §1985(3) as expounded in *Griffin v. Breckenridge,* 403 U.S. 88 (1971).

The district court in its opinion correctly noted that *Griffin* is controlling in this case. That court, after discussing the *Griffin* holding, stated:

> ". . . Plaintiffs do not claim that defendants were motivated by racial animus. The critical question which this Court must then decide is what other 'kind of invidiously discriminatory

motivation'—in addition to racial bias—did the Court have in mind when it used the words 'class-based, invidiously discriminatory animus.'

"A close reading of *Griffin* leads this Court to conclude that the words 'class-based, invidiously discriminatory animus' refer at most, to that kind of irrational and odious class discrimination akin to racial bias—such as discrimination based on racial bias—such as discrimination based on national origin or religion. The complaint alleges no such discrimination.

"Furthermore, for this Court to conclude that Section 1985 (3) was intended to embrace the class urged here—a newspaper dealers' trade association—would, in effect, amount to treating that Section as a general federal tort law."

We affirm on other grounds discussed below.

The claims which appellants' complaint must establish to state a cause of action under Section 1985 (3) were enumerated by *Griffin:*

"To come within the legislation a complaint must allege that the defendants did (1) 'conspire or go in disguise on the highway or on the premises of another' (2) 'for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the law.' It must then assert that one or more of the conspirators (3) did, or cause to be done 'any act in furtherance of the object of [the] conspiracy,' whereby another was (4a) 'injured in his person or property' or (4b) 'deprived of having and exercising any right or privilege of a citizen of the United States.'" 403 U.S. at 102-03.

The allegations in the complaint, on their face, fulfill the requirements of elements (1) and (3). In this case, element (2), whose absence caused the district court to grant the motion under Fed. R. Civ. P. 12 (b)(6), and element (4b) present substantial questions left unanswered by *Griffin*.

The Court in *Griffin* interpreted the language of the element (2) requirement, "*purpose*[1] (emphasis added) of depriving . . . of the *equal* protection of the law, or of *equal* privileges and immunities under the law," as indicating a Congressional intent to limit the scope of Section 1985(3). The Court said:

> ". . . That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others. . . . The constitutional shoals that would lie in the path of interpreting Section 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose—by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment. . . . The language requiring intent to deprive of *equal* protection or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, individually discriminatory animus behind

[1]The Court in *Griffin*, in effect, "held that a purpose to deprive a person of equal rights will be inferred from the racial [or other class-based] motivation of the conspiracy." The Supreme Court, 1970 Term, 85 Harv. L. Rev. 3, 98 n. 21 (1971). *Cf.* Griffin v. Breckenridge, 403 U.S. at 102 n. 10; Azar v. Conley, 456 F.2d 1382, 1385-86 (6th Cir. 1972).

> the conspirators' action.[9] The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all."[10] 403 U.S. at 102.

And in footnote 10 the Court explained:

> ". . . The motivation aspect of Section 1985(3) focuses not on scienter in relation to deprivation of rights but on invidiously discriminatory animus." *Id.*

We do not believe that the allegations by appellant suffice under the purpose requirement of element (2) —"class-based, individually discriminatory animus"— to be actionable under Section 1985(3) as discussed in *Griffin*. The class, in the present case, is composed of over four hundred newspaper dealers of the Los Angeles Times, each of whom has an independent contract with the Los Angeles Times. The appellants are seventeen of these dealers who allege that the appellees conspired to violate their right of association in forming and maintaining a newspaper dealers' association. The flaw appears in the appellant's syllogism when the "animus" alleged herein is compared to that in *Griffin*. There the motivating hostility was derived from the fact that the plaintiffs were black, members of a racial class against which animus existed, and that the defendants believed them to be civil rights organizers. But here, the appellants were not injured because they were newspaper dealers, the class alleged but because of their activities in attempting to maintain a dealer association. The animus is directed at and derived from the dealer association and is di-

vorced from the fact that there is a class of newspaper dealers.[2]

The deficiency in the appellant's complaint is similar to that in *Hughes v. Ranger Fuel Corp.*, 467 F.2d 6, 8-10 (4th Cir. 1972). The plaintiffs there alleged that while engaging in efforts to "turn in" violators of the 1899 Refuse Act, the defendant "pelted them with rocks and otherwise assaulted them, driving them from the scene of the pollution for the purpose of preventing them from securing photographic evidence" for a prospective cause of action in the federal court. The court stated:

> "In their complaint, the plaintiffs make no allegations of any class-based motivation on the part of the defendants. . . . There is no averment in the complaint that the defendants attacked the plaintiffs because the latter were environmentalists, as had been suggested in this Court; the allegations of the complaint are specific that the assault was sparked solely by the instant reaction of the defendants to the fact that the plaintiffs were seeking to photograph the defendants, clearly for the purpose of prosecuting them under the Refuse Act. Theirs was a purely spontaneous act, not alleged to be a part of any general pattern of discriminatory action directed to any class, as was the situation in Action v. Gannon (8th Cir. 1971) 450 F.2d 1227." *Id.* at 10.

The element (4b) necessary for a cause of action under *Griffin* requires the appellant to be "deprived of

---

[2]Having found the allegations in the complaint inadequate on the above ground, we find it unnecessary to reach the "class" question on which the district court based its decision.

having and exercising any right or privilege of a citizen of the United States." 403 U.S. at 103. The appellant asserts a deprivation of his first amendment right of association. Since the first amendment has not been held to be a restraint on *private* conduct, only on state action, the appellant suggests two novel arguments for sustaining his right. First, the appellant would argue that the elimination of the state action requirement by *Griffin* extends the right of association under the first amendment as a bar against private interference as well as state action in Section 1985(3) suits.[3] Second, appellant asserts that the right of association is one of that bundle of rights held by all persons who are *national citizens.*[4] Since we have affirmed the district court's decision on the class-based animus limitation, it is unnecessary for us to reach these issues or the question of the constitutional power of Congress to enact such a statute.[5]

The judgment of the trial court is AFFIRMED.

---

[3]This can be accomplished by reading Section 1985(3) as a substantive law embodying constitutional rights without the state action requirement rather than just a remedial statute. Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971) (*en banc*); Commonwealth of Pennsylvania v. Local Union #542, Int. U. of Op. Eng. 347 F. Supp. 268 (E.D. Penn. 1972). *See* Griffin v. Breckenridge, 403 U.S. 88, 90, 103 (1971); The Supreme Court, 1970 Term, 85 Harv. L. Rev. 3, 99-100 (1971). *Contra, Dombrowski v. Dowling,* 459 F.2d 190, 193-196 (7th Cir. 1972). *Cf.* Place v. Shepherd, 446 F.2d 1239 1246 (6th Cir. 1971).

[4]To support the derivation of such a *national* personal right, the appellants cite *Griffin v. Breckenridge,* 403 U.S. at 104, 105, 106; *Griswold v. Connecticut,* 381 U.S. 479, 483 (1965); *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449, 460-61 (1958); *De Jonge v. Oregon,* 299 U.S. 353, 364 (1937).

[5]*See* U. S. Const. Amend. XIV, §5; Commonwealth of Pennsylvania v. Local Union #542, Int. U. of Op. Eng., *supra. Cf.* United States v. Guest, 383 U.S. 745 (1966).

SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-1132

WILLIAM D. ARNOLD, FLOYD W. McKINSEY, ABRAHAM BARON, WARREN H. CHURCHILL, ROBERT W. ASH, HORACE W. HOWLAND, CHARLES McGUIRE, ROBERT COHEN, PAUL LEE BLUFF, STEVEN Z. KRSTICH, MICHAEL MALETA, ANGELO J. MASI, RUDOLPH C. DE LUNA, W. H. HOPKINS, PATRICK J. GERMON, JAMES C. DENNIS, JAMES NELSON HOPKINS

Plaintiffs and Petitioners

vs.

BERT R. TIFFANY, STEPHEN RATKOVITCH, LLOYD SPENCE, HARRY L. CLARKE, JOE CAPPONI, ROBERT D. NELSON, VANCE L. STICKELL, THE TIMES MIRROR COMPANY, WES SPAULDING

Defendants and Respondents

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

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Defendants and Respondents

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

QUESTION PRESENTED

Whether the courts below correctly refused to extend the reach of Section 1985(3) of the Civil Rights Act of 1871 to a claim that 17 independent newsdealers were deprived of their First Amendment right to peaceably assemble by the purely private, allegedly discriminatory conduct of defendants which was not based on race, religion, national origin or other similarly invidious grounds.

STATEMENT OF THE CASE

A. The Nature of the Case

The Complaint in this action was filed on February 12, 1973 in the United States District Court for the Central District of California seeking preliminary and permanent injunctive relief and damages under Section 1985(3) of the Civil Rights Act of 1871, Title 42 of the United States Code.[1] The action was brought by 17 independent newspaper dealers on their own behalf, and not for the benefit of any class, against The Times Mirror Company ("Times Mirror"), publisher of the Los Angeles Times ("The Times"), seven of its officers or employees, and against one other independent newspaper dealer. [Clerk's Transcript ("CT"), pp. 1-7.]

---

[1]Although the Complaint charges violations of Sections 1981 and 1982, plaintiffs admitted in the District Court that if Section 1985(3) did not apply the other two sections were also inapplicable. Reporter's Transcript, Proceedings of February 26, 1973, p. 47; Reporter's Transcript, Proceedings of March 2, 1973, pp. 10-12, 13-14. See also the Memorandum and Order Granting Motion to Dismiss, Petition for a Writ of Certiorari ("Petition"), Appendix A, p. ii. Since plaintiffs did not challenge this finding by the District Court in the Court of Appeals or in their Petition, it is apparent that they waive any contention as to the applicability of Sections 1981 or 1982 to this case. *United States v. Spector* (1953), 343 U.S. 169, 96 L.Ed. 863, 72 S.Ct. 591, *reh. denied*, 343 U.S. 951, 96 L.Ed. 1353, 72 S.Ct. 1040; *Iob v. L.A. Brewing Co.* (9th Cir. 1950), 183 F.2d 398, 401.

The crucial allegation of the Complaint is contained in Paragraph (20), which charges that "defendants have conspired with invidiously discriminatory animus to deprive on a class-wide basis Los Angeles Times newspaper dealers including plaintiffs of the equal protection of the laws through intimidating, harassing, causing economic injury and coercing said dealers from exercising their rights under the First and Fourteenth Amendments to the United States Constitution to peaceably assemble." [CT pp. 7-8.]

B. The Course of the Proceedings

In the District Court for the Central District of California, defendants[2] moved to dismiss the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure on the ground that plaintiffs had failed to state a claim for relief. In granting that motion, the District Court, in its Memorandum and Order, a copy of which is attached to the Petition for a Writ of Certiorari ("Petition") as Appendix A, stated, in pertinent part:

> "The case that controls the disposition of defendants' motion is *Griffin v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1970 [*sic*] (1971).
>
> "In *Griffin* the Court held that §1985(3) did apply to private conspiracies. The Court, however, carefully limited its holding by stating: 'That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others. * * * The constitutional

[2]Throughout this brief, the parties will be referred to by their designation in the District Court, *i.e.*, petitioners will be called "plaintiffs" and respondents will collectively be referred to as "defendants".

shoals that would lie in the path of interpreting §1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose—by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment.' (References omitted). *Griffin, supra,* at 101, 102, 91 S.Ct. at 1798.

"The Court then explained that '[t]he language [used by the sponsors of the limiting amendment] requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory "animus behind the conspirators" actions.' Id. (Emphasis in original). [Footnote omitted.]

"In short, '[t]he motivation aspect of §1985 (3) focuses * * * on invidiously discriminatory animus.' Id. at note 10. Plaintiffs do not claim that defendants were motivated by racial animus. The critical question which this Court must then decide is what other 'kind of invidiously discriminatory motivation'—in addition to racial bias—did the Court have in mind when it used the words 'class-based, invidiously discriminatory animus.'

"A close reading of *Griffin* leads to [*sic*] this Court to conclude that the words 'class-based, invidiously discriminatory animus' refer, at most, to that kind of irrational and odious class discrimination akin to racial bias—such as discrimination based on national origin or religion. The complaint alleges no such discrimination.

"Furthermore, for this Court to conclude that §1985(3) was intended to embrace the class urged here—a newspaper dealers' trade association—would, in effect, amount to treating that section as a general federal tort law.

"Accordingly, defendants' motion to dismiss under F. R. Civ. P. 12(b)(6) is granted, plaintiffs' pending motion for injunctive relief is denied, and the complaint is dismissed."

Memorandum and Order Granting Motion to Dismiss, Petition, Appendix A, pages iii and iv.

The Court of Appeals for the Ninth Circuit affirmed the dismissal of plaintiffs' complaint by the District Court. A copy of that opinion is attached to the Petition as Appendix B. In its opinion, the Court of Appeals first noted that the District Court had correctly held the Supreme Court's decision in *Griffin v. Breckenridge* (1971), 403 U.S. 88, 29 L.Ed.2d 338, 91 S.Ct. 1790, to be controlling. *Arnold v. Tiffany,* Opinion of the Ninth Circuit, Petition, Appendix B, p. vii. The Court then acknowledged the ruling of the District Court, *id.* at viii, but chose to affirm on the other ground.

The Court of Appeals concluded:

"The class, in the present case, is composed of over four hundred newspaper dealers of the Los Angeles Times, each of whom has an independent contract with the Los Angeles Times. The appellants are seventeen of these dealers who allege that the appellees conspired to violate their right of association in forming and maintaining a

newspaper dealers' association. The flaw appears in the appellant's syllogism when the 'animus' alleged herein is compared to that in *Griffin*. There the motivating hostility was derived from the fact that the plaintiffs were black, members of a racial class against which animus existed, and that the defendants believed them to be civil rights organizers. But here, the appellants were not injured because they were newspaper dealers, the class alleged but because of their activities in attempting to maintain a dealer association. The animus is directed at and derived from the dealer association and is divorced from the fact that there is a class of newspaper dealers." [Footnote omitted.]

Arnold v. Tiffany, Opinion of the Ninth Circuit, Petition, Appendix B, pp. x-xi.

Plaintiffs now seek a second review of the District Court's opinion by way of their petition for a writ of certiorari.

STATEMENT OF THE FACTS RELEVANT TO THE ISSUE PRESENTED

Plaintiffs' Complaint, [CT, pp. 1-26], contains no allegations of any state action in support of defendants' alleged derelictions, nor does it allege any impediment to plaintiffs' rights to travel in interstate commerce. Similarly, the Complaint does not charge any form of discrimination based on religion, national origin, sex or age. Plaintiffs specifically admitted in the District Court that there was no racial motivation on any defendants' part [RT, Proceedings of February 26, 1973, p. 17, lines 17-23], and that they did not wish to plead further. [RT, Proceedings of February 26, 1973, pp. 47-48.] Thus, this case involves the decision of a business entity to terminate its relationship with an independent contractor, allegedly because the business disagreed with the aims of the trade association of which the contractor was a member.

ARGUMENT

This Case Does Not Present Issues Which the Supreme Court Should Decide by the Issuance of a Writ of Certiorari

Plaintiffs' Petition ignores the fact that the granting of a writ of certiorari is not designed to give the defeated party in the court of appeals another hearing. As pointed out below, this case does not fall into any of the categories outlined in Rule 19 of the Supreme Court Rules. Moreover, the statutory construction advocated by plaintiffs would raise a substantial question as to the constitutionality of that legislation. The courts below correctly avoided that construction.

A. The Rulings of Both of the Courts Below Were Clearly Dictated by the Holding of This Court in Griffin v. Breckenridge and Should Not Be Disturbed.

In the present case, the District Court for the Central District of California dismissed plaintiffs' action because their Complaint failed to state a claim upon which relief could be granted. The District Court held that the decision of the Supreme Court in *Griffin v. Breckenridge* was controlling, and ruled:

> "A close reading of *Griffin* leads this Court to conclude that the words 'class-based, invidiously discriminatory animus' refer, *at most*, to that kind of irrational and odious class discrimination akin to racial basis—such as discrimination based on national origin or religion. The complaint alleges no such discrimination." [Emphasis added.]
>
> Memorandum and Order Granting Motion to Dismiss, Petition, Appendix A, p. iv.

The ruling by the District Court was squarely in keeping with the holding and the spirit of *Griffin*. Thus, while every case decided under Section 1985(3) of Title 42 of the United States Code ("Section 1985 (3)") has been based on racial discrimination, plaintiffs' complaint, appeal and this Petition have all been based on the rather startling proposition that one may invoke the jurisdiction of the Federal Courts under the Civil Rights Act of 1871 merely by alleging that a small group of individuals, who share the same occupation and have similar objectives concerning the enterprise with which they deal, are a "class" within the meaning of Section 1985(3). Plaintiffs base this novel contention on their reading of the *Griffin* decision.

Plaintiffs claim that *Griffin* establishes that an action under Section 1985(3) can be based on the traditional ground of racial discrimination, *or* it can be based on other "class-based" discrimination. *Griffin* does not stand for that proposition at all. This is what *Griffin* said:

> "[T]here must be some racial, or *perhaps* otherwise class-based, invidiously discriminatory animus behind the conspirators' action.'" [Emphasis added.]
>
> *Griffin v. Breckenridge*, 403 U.S. 88, 102.

Footnote 9 states:

> "We need not decide, given the facts of this case, whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under the portion of §1985(3) before us."
>
> *Griffin v. Breckenridge*, 403 U.S. 88, 102 n. 9.

Because *Griffin* clearly did involve racial discrimination, the Court did not have to resolve the question of whether some invidiously discriminatory animus based on a class other than race *might* meet the requirement of Section 1985(3). Plaintiffs have not cited a single case decided under Section 1985(3) in which the court has held that non-racial discrimination would be sufficient.

Plaintiffs have glossed over the issue of the racial discrimination requirement under Section 1985(3) by citing cases, Petition, pp. 26-29, which clearly involve state action in support of defendants' alleged wrongdoing. *Azar v. Conley* (6th Cir. 1972), 456 F.2d 1382, is relied upon on the strength of dictum contained in a footnote. *Id.* at 1396 n.5. *Kletschtka v. Driver* (2nd Cir. 1969), 411 F.2d 436, involved another statement in dictum made by a Court of Appeals, but this statement was made *prior* to the decision in *Griffin*. Moreover, in that case, the Court of Appeals reversed a decision of the District Court dismissing a suit under Section 1983 of Title 42 of the United States Code, *id.* at 447-49, but affirmed the Court's decision dismissing plaintiff's claim under Section 1985(3). *Id.* at 447. *Griffin* does not detract from the accepted notion that the Ku Klux Klan Act was designed to implement the Thirteenth and Fifteenth Amendments and that a complaint under Section 1985(3) must be tied to the evils which the Amendments and the legislation were designed to cure.

If the application of Section 1985(3) is to be extended to purely private discrimination based on factors other than race, the logical extension would be to apply the statute only to discrimination against a class of persons united by those fundamental, human char-

acteristics considered by the Supreme Court under the Equal Protection Clause of the Fourteenth Amendment to be "suspect" when used by a state government as a basis of classification, that is, to religion, national origin, sex and, possibly, age. Defendants submit that, at most, it was these "suspect" classifications which the Court had in mind when it said in *Griffin* that *perhaps* other class-based discriminations *might* be covered by Section 1985(3). 403 U.S. at 102. Plaintiffs do not allege discrimination on the basis of any of these natural characteristics of people. There is simply a small group of individuals who claim their status as a class solely because they share the same occupation and have similar objectives concerning the enterprise with which they deal.

Plaintiffs claim that defendants' acts have been part of a conspiracy to deprive them of the equal protection of the laws.[8] [CT, p. 8.] This small group of plaintiffs—newspaper dealers—hardly raises itself to the level of a "class" in the sense that word is used in the context of civil rights. It is merely a group of individuals engaged in the same occupation and dealing with the same company. As the District Court below noted, "for this Court to conclude that §1985(3) was intended to embrace the class urged here—a newspaper dealers' trade association—would, in effect, amount to treating that section as a general federal tort law." Memorandum and Order Granting Motion to Dismiss, Petition, Appendix A, p. iv.

If Section 1985(3) is indeed to be extended to cover a member of this business association, it must similar-

[8]Of the more than 400 Times dealers in the Los Angeles area, only 17 dealers are involved in this litigation.

ly cover the members of any group of people who form an association to further any common purpose or interest. The terminated individual could always allege that his right to association was being denied by the termination and bring an action under Section 1985 (3).

The "class" of members of a business association is thus not the type of class to which the application of Section 1985(3) should be extended, even if it were to be held that that statute was intended to prohibit private, non-racial discrimination. The Congress that passed this post-Civil War statute popularly known as the Ku Klux Klan Act could not possibly have intended that the legislation apply to the facts of this case.

The decision of the District Court was thus in keeping with the holding of this Court in *Griffin* and with the rulings of numerous other decisions by courts of appeals and district courts. Therefore, there is no lack of uniformity justifying the supervisory jurisdiction of this Court.

Plaintiffs apparently would also bring themselves within Rule 19 of the Supreme Court's Rules by their statement that the "Court of Appeal's rationale in this case runs completely counter to this Court's reasoning in *Griffin*." Petition, p. 31.

Plaintiffs' argument ignores the fact that *Griffin* holds only that "[T]here must be some racial, or *perhaps* otherwise class-based invidiously discriminatory animus behind the conspirators' action." [Emphasis added; footnote 9 omitted.] *Griffin v. Breckenridge*, 403 U.S. at 102. Footnote 9 affirms that the question of bias based on characteristics other than race was not before the Court.

Clearly, the case at bar is not one involving race. Moreover, this case is not one involving a "suspect" classification, which the District Court stated to be the maximum possible reach of Section 1985(3). The Court of Appeals affirmed the District Court's decision, but on the narrower ground that plaintiffs' allegations did not suffice to meet the parameters of *Griffin*, whatever they might be, because the animus alleged was not directed at the class specified. The Court analogized its ruling to that of the Court of Appeals for the Fourth Circuit in *Hughes v. Ranger Fuel Corp.* (1972), 467 F.2d 6. See Opinion of the Ninth Circuit, Petition, Appendix B, p. vi.

Plaintiffs argue that the ruling of the Ninth Circuit would have required dismissal in *Griffin* also. Plaintiffs claim that in *Griffin*, as in the present case, the animus was directed at and derived from only the civil rights activities of the petitioners in that case and was divorced from the fact that there was a class of blacks. The language of the Court in *Griffin*, however, shows that plaintiffs' assertion is wrong. In examining the complaint to determine whether it stated a cause of action under Section 1985(3), the Court stated:

> "These allegations clearly support the requisite animus to deprive the petitioners of the equal enjoyment of legal rights *because of their race*." [Emphasis added.]
>
> *Griffin v. Breckenridge*, 403 U.S. 88, 103.

The animus in *Griffin* was thus directed against blacks, not just civil rights workers.

In the present case, as pointed out by the Ninth Circuit, the alleged animus is directed at the dealer association, not the alleged class of all newspaper deal-

ers. Thus, the ruling of the Court of Appeals in this case is entirely consistent with and follows this Court's holding in *Griffin*.

The only conflict of decisions among the circuits which plaintiffs note is that pertaining to the question of whether Section 1985(3), if applied to the facts of this case, would render the statute unconstitutional for lack of congressional power to enact the legislation. See Petition, page 36 n. 7. That question was not reached by either the District Court or the Court of Appeals, so this conflict need not be resolved in the context of the present case.

B. To Interpret Section 1985(3) as Plaintiffs Proposed Would Raise a Substantial Question as to the Constitutionality of the Statute.

Whether or not one is inclined to confine Section 1985(3) to private discrimination based on race, under the holding of the Supreme Court in *Griffin v. Breckenridge* it is still necessary in every case "to identify a source of congressional power to reach the private conspiracy alleged by the Complaint. . . ." 403 U.S. at 104. Defendants submit that, in the context of the Complaint in this case, to hold Section 1985(3) applicable would render that statute unconstitutional and void as applied, since no source of congressional power would support that application. *Dombrowski v. Dowling* (7th Cir. 1972), 459 F.2d 190. *Contra, Action v. Gannon* (8th Cir. 1971), 450 F.2d 1227 (en banc).

Plaintiffs ignore an elementary principle of constitutional law, that is, that Congress cannot create a fed-

eral cause of action in the absence of some specific Constitutional delegation to Congress of the power to make the violation actionable. In *Griffin*, that power devolved from Section 2 of the Thirteenth Amendment, which gave to Congress the power to eradicate the vestiges of slavery. 403 U.S. at 105. The Court also found authority in the power of Congress to protect interstate travelers from private discrimination. *Id.* at 106.

In the present case, plaintiffs' Complaint does not allege racial discrimination, and plaintiffs' counsel admitted to the District Court that there were no racial overtones to this suit. [RT, Proceedings of February 26, 1973, p. 17.] Similarly, the Complaint may be searched in vain for any allegation of a violation of plaintiffs' right to interstate travel. [CT, pp. 1-26.] What is alleged is a violation of plaintiffs' right to "the equal protection of the la /s" by the alleged action of defendants in preventing plaintiffs "from exercising their rights under the First and Fourteenth Amendments to the United States Constitution to peaceably assemble." [CT, p. 8.] Nonetheless, it is clear that these freedoms are only protected against Federal governmental interference by the Bill of Rights, and from state interference by incorporation into the Fourteenth Amendment.

Nowhere in the Constitution is Congress given the general power to enact legislation designed to protect these rights from purely private discrimination. It is clear that Congress has not attempted, in enacting Section 1985(3), to pass such legislation. Indeed, in the

recent Supreme Court decision in *Moose Lodge No. 107 v. Irvis* (1972), 407 U.S. 163, 32 L.Ed.2d 627, 92 S.Ct. 1965, the Supreme Court reaffirmed "the essential dychotomy between discriminatory action by the State, which is prohibited by the Equal Protection Clause, and private conduct, 'however discriminatory or wrongful,' against which that clause 'erects no shield.'" 407 U.S. at 172.

Because neither of the courts below accepted the construction of Section 1985(3) proposed by plaintiffs, however, this question was neither reached nor resolved below, and need not be resolved here.

Conclusion

By indirection, plaintiffs would apparently assert that a writ of certiorari should be issued in this case either because the decision of the District Court for the Central District of California, or the affirming opinion of the Court of Appeals, is in conflict with applicable decisions of this Court. It is clear, however, that both opinions were dictated by the decision of this Court in *Griffin v. Breckenridge*. The only issue on which plaintiffs cite any conflict among the lower courts pertains to an issue not reached below. Moreover, a reading of the cases makes it apparent that Section 1985(3) cannot be applied to the facts alleged, nor can that statute be read as plaintiffs would read it, without raising a substantial issue as to the constitutionality of the statute. Defendants submit that the decision of the District Court was correct and

that the defendants' motion to dismiss under Rule 12 (b)(6) of the Federal Rules of Civil Procedure was appropriately granted.

Defendants respectfully pray that the Petition for a Writ of Certiorari be denied.

Dated: February 22, 1974.

Respectfully submitted,

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